John a/k Nyumbei v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q–05–30 OF 1997
TENGKU BAHARUDIN SHAH, RAUS SHARIF AND ABDULL HAMID EMBONG JJCA
12 MARCH 2007

Criminal Procedure — Defence — Insanity — Test for — Whether legal or medical test — Penal Code s 84

Criminal Procedure — Defence — Insanity — Matters for court's consideration when insanity raised

Criminal Procedure — Defence — Insanity — Burden and standard of proof — Whether insanity an exclusive right of the accused

The accused appealed to the Court of Appeal against his conviction and sentence for the murder of an 18 year old girl. The trial was conducted in the High Court with the aid of assessors. At the trial, the accused unsuccessfully raised the defence of insanity. In support of his defence, the accused had adduced the following evidence: (i) his own testimony that a certain 'Jimmy' — purportedly a vengeful person of whom the accused was scared of — had forced him to kill someone; and (ii) evidence of DW2 — a consultant psychiatrist — who found DW2 to be suffering from 'acute psychotic disorder'. The testimony of the accused however conflicted with his own cautioned statement admitted in evidence, wherein he inter alia described how he had killed the deceased; and detailed various grisly acts he carried out on the corpse — including how he had disposed of the severed head of the deceased. The accused made no mention of 'Jimmy' in the cautioned statement. In the Court of Appeal, counsel for the accused argued that the trial judge erred in rejecting the defence of insanity and that he had failed to explain the technical evidence of DW2 to the assessors.

Held, dismissing the appeal:

(1) The test for insanity under s 84 of the Penal Code is a legal and not a medical test. Legal insanity under s 84 is of such a kind that impairs the cognitive faculties of a person. It must make the offender incapable of knowing the nature of his act, or that what he is doing is wrong or contrary to law (see paras 14–15).

(2) Where the defence of insanity is raised a court must consider the following matters: (i) whether the accused person has successfully established, as a

preliminary issue, that at the time of committing the act he was of unsound mind; and (ii) if he was of unsound mind, whether he has proven that his unsoundness of mind was of a degree to make him incapable of knowing the nature of his act as being wrong or against the law. The court should also consider the circumstances which come after the crime — which is a material consideration in deciding whether the appellant had satisfied the test under s 84 (see paras 16 & 22).

(3) The burden of proof rests upon the person who raises the defence of insanity, viz the accused. However the requisite standard is on a balance of probabilities, as in a civil case. It is only the accused person who has the right to raise a defence of insanity. It is not open to the court or the prosecution to raise it (see paras 17–18, 28); *Juraimi bin Hussin v PP* [1988] 1 MLJ 537; *Baharom v PP* [1960] MLJ 249; *PP v Misbah bin Saat* [1997] 3 MLJ 495; *Rajagopal v PP* [1977] 1 MLJ 6, *Goh Yoke v PP* [1970] 1 MLJ 63 referred.

(4) In the instant case, DW2's evidence was totally not in favour of the appellant. His opinion was that the appellant was not of unsound mind at the time he committed the offence — which is the crucial time when insanity has to be established. The accused was capable of knowing the nature of his act as being against the law. He was thus not insane (see paras 19 & 21).

(5) The appellant's act in disposing of the skull after severing the deceased's head showed a degree of guilt and an effort to avoid detection. The existence of 'Jimmy' was also made up to spice up his story that he was driven by an insane delusion to commit the crime (see paras 22–23).

(6) The trial judge's summing up to the assessors was undertaken with great care, was impeccable and unimpeachable. The assessors could not have misunderstood the summing up or the evidence of DW2. There was no misdirection by the trial judge in his summing up (see para 29).

[Bahasa Malaysia summary

Tertuduh merayu ke Mahkamah Rayuan terhadap sabitan dan hukumannya kerana membunuh seorang perempuan berumur 18 tahun. Perbicaraan dijalankan di Mahkamah Tinggi dengan bantuan penaksir-penaksir. Semasa perbicaraan, tertuduh gagal menimbulkan pembelaan hilang akal. Bagi menyokong pembelaannya, tertuduh telah mengemukakan keterangan berikut: (i) testimoninya sendiri bahawa 'Jimmy' — yang dikatakan seorang pendendam yang tertuduh takuti — telah memaksanya membunuh seseorang; dan (ii) keterangan DW2 — perunding pakar psikiatri — yang mendapati DW2 mengalami 'acute psychotic disorder'. Testimoni tertuduh bagaimanapun bercanggah dengan kenyataan beramarannya sendiri yang diterima dalam keterangan, di mana beliau antara lain menggambarkan bagaimana beliau telah membunuh si mati. Tertuduh tidak menyebut tentang 'Jimmy' dalam kenyataan beramaran tersebut. Di Mahkamah Rayuan, peguam bagi pihak tertuduh berhujah bahawa hakim perbicaraan terkhilaf dengan menolak pembelaan untuk hilang akal dan telah gagal menjelaskan keterangan teknikal DW2 kepada penaksir-penaksir.

(1) Ujian untuk hilang akal di bawah s 84 Kanun Keseksaan berunsur undang-undang dan bukan ujian perubatan. Hilang akal menurut undang-undang adalah suatu yang mengurangkan daya fikiran kognitif seseorang. Ia menjadikan pesalah tidak dapat mengetahui sifat tindakannya, atau yang beliau melakukan suatu yang salah atau bertentangan dengan undang-undang (lihat perenggan 14–15).

(2) Pembelaan hilang akal yang ditimbulkan di mahkamah hendaklah mengambilkira perkara-perkara berikut: (i) sama ada tertuduh berjaya membuktikan, sebagai isu awal, bahawa pada masa melakukan tindakan itu beliau tidak waras; dan (ii) jika beliau tidak waras, sama ada beliau telah membuktikan ketidakwarasannya di tahap yang boleh membuatkannya tidak mengetahui sifat tindakannya sebagai suatu yang salah atau menyalahi undang-undang. Mahkamah juga patut mengambilkira keadaan yang timbul selepas jenayah itu — yang merupakan pertimbangan penting dalam memutuskan sama ada perayu telah memenuhi ujian di bawah s 84 (lihat perenggan 16 & 22).

(3) Beban pembuktian terletak ke atas seseorang yang menimbulkan pembelaan hilang akal, iaitu tertuduh. Namun piawai keperluan adalah atas imbangan kebarangkalian, seperti dalam kes sivil. Hanya tertuduh mempunyai hak menimbulkan pembelaan hilang akal. Ia bukan untuk mahkamah atau pihak pendakwaan menimbulkannya (lihat perenggan 17–18, 28); *Juraimi bin Hussin v PP* [1988] 1 MLJ 537; *Baharom v PP* [1960] MLJ 249; *PP v Misbah bin Saat* [1997] 3 MLJ 495; *Rajagopal v PP* [1977] 1 MLJ 6, *Goh Yoke v PP* [1970] 1 MLJ 63 dirujuk.

(4) Dalam kes semasa, keterangan DW2 langsung tidak menyebelahi perayu. Pendapatnya bahawa perayu bukanlah seorang yang tidak waras pada masa beliau melakukan kesalahan itu — adalah masa yang penting tatkala hilang akal dibuktikan. Tertuduh mampu memahami tindakannya yang menyalahi undang-undang. Beliau oleh itu tidak hilang akal (lihat perenggan 19 & 21).

(5) Tindakan perayu membuang tengkorak selepas memutuskan kepada si mati menunjukkan tahap kebersalahan dan satu usaha mengelak sebarang pengesanan. Kewujudan 'Jimmy' juga direka agar ceritanya lebih menarik di mana beliau didorong oleh delusi yang tidak masuk akal untuk melakukan jenayah (lihat perenggan 22–23).

(6) Kesimpulan hakim perbicaraan kepada penaksir-penaksir telah dilaksanakan dengan berhati-hati, baik dan boleh dipercayai sepenuhnya. Penaksir-penaksir tidak mungkin tersalah faham dengan kesimpulan keterangan DW2. Tiada salah arah oleh hakim perbicaraan dalam kesimpulannya (lihat perenggan 29).]

Notes

For cases on defence for insanity, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1720–1721.

Cases referred to

Baharom v PP [1960] MLJ 249 (refd)
Goh Yoke v PP [1970] 1 MLJ 63 (refd)

A *Juraimi bin Hussin v PP* [1988] 1 MLJ 537 (refd)
PP v Muhammad Suhaimi Abdul Aziz [2004] 1 CLJ 378 (refd)
Rajagopal v PP [1977] 1 MLJ 6 (refd)

Legislation referred to

B Evidence Act 1950 s 45
Penal Code s 84

Appeal from: Criminal Trial No CT/KG 1/94(1) (High Court, Kuching)

C *JB Singh (Anthony Tai with him) (JB Singh & Co) for the appellant.*
Meor Hashimi bin Abdul Hamid (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdull Hamid Embong JCA (delivering judgment of the court):

D

[1] The appellant was convicted of murder and was sentenced to death after a full trial heard by the High Court judge sitting with two assessors at the High Court in Kuching, Sarawak on 11 April 1997.

E **[2]** The charge stated that:

> That you, on 16th day of March 1993 at between 5.30am and 7am at Sebuku, Bau, in the state of Sarawak, committed murder by causing the death of one JONG LIU CHIN (f) and you thereby committed an offence punishable under s 302 of the Penal Code. (FMS Cap 45).

F

[3] We heard this appeal at our sitting in Kuching and dismissed it. We now give our reasons. First, the brief facts.

[4] On 16 March 1993 ASP Sayang Kavang (PW4) was informed by Sgt Jien G (PW20) about the finding of a corpse at the scene of the crime at Sebuku, Bau. On arrival there PW4 found a headless body donned in a blue colored school uniform with a name tag of 'Jong Liu Ching' ('the deceased') pinned on it. In a school bag found nearby, he also found some books with the name of the deceased written on them. On the same night, the deceased was sent to the mortuary at the H Sarawak General Hospital where a post mortem was conducted on it.

[5] The appellant was arrested on 18 March 1993 and he led the police to the recovery of a knife. Also resulting from his interrogations police recovered a human skull, later determined by PW3, Prof. Dr Masatsugu Hashimoto, a Professor in Forensic Odontology and Physical Anthropology at the University of Tokyo, to be I that of the deceased. The deceased, a schoolgirl, aged 18 years was identified by both her parents.

[6] Dr Hajjah Sardar Jehan, a forensic pathologist at the Sarawak General Hospital, in her evidence adduced by deposition (exh p 43) stated that she conducted an

autopsy on the deceased and stated the cause of death as transection of the spinal cord due to decapitation of the head. Dr Sardar Jehan also deposed that upon a vaginal examination of the deceased, she found evidence of sexual intercourse from the large amount of sperms deposited, although there was no evidence of rape.

[7] In his cautioned statement, admitted as exh P51, after the learned trial judge conducted a trial within a trial, the appellant had admitted to killing the deceased at Sebuku, Bau, and then had sexual intercourse with the corpse. He had also stripped off from the deceased her ring, earrings and some money from her purse. In his sworn testimony, the appellant further maintained to killing the deceased on 16 March 1993 at Sebuku Road, Bau. The appellant also admitted to severing the deceased head and carried it away with him. He then peeled off the skin of the head and threw away the skull into a jungle at Kampung Opar, Bau.

[8] It was not disputed that the appellant had perpetrated this heinous crime. The only issue now before us was whether the appellant had successfully raised a defence of insanity, which learned counsel for the appellant put forth as the sole ground of appeal for our consideration. We will treat this sole issue under the two grounds on which it was argued, namely:

(a) that the appellant had on a balance of probability raised a reasonable doubt on the issue of insanity

[9] In his defence, the appellant stated that he had killed the deceased because a certain 'Jimmy' had instigated him to do so. Jimmy had asked him to bring the skull to Kampung Opar but he had thrown it into the jungle because he got scared. This part of his evidence is however different from what he had said in his cautioned statement where he admitted to hiding the skull in some bushes. He also said that Jimmy had threatened his life if he did not kill someone and take his head. The appellant stated that he was scared of Jimmy whom he described as a vengeful person. From the witness box, the appellant also said that he was aware of the offence he had committed and felt sorry for the deceased. He further recounted how he had stabbed the deceased's throat with a knife and severed her head. To a question by the learned deputy public prosecutor as to why he had not mentioned about Jimmy in his cautioned statement, the appellant explained that that was because he was scared of Jimmy. The appellant further said that he was not conscious of what he did when he committed the crime and that he could only remember what Jimmy had told him to do. He also asserted that he did not know that his act was an offence or that he would be arrested for it.

[10] In support of his defence of insanity the appellant had called Dr Abang Bennett Taha (DW2) a consultant psychiatrist then with the Sarawak General Hospital. DW2 observed and attended to the appellant from 2 April 1993 to 28 April 1993. DW4 conducted four interviews on the appellant during that period. He also interviewed the appellant's father on 8 April 1993. DW2 found the appellant to be suffering from what he termed as 'acute psychotic disorder'. He explained that the word 'acute' did not indicate the severity of the appellant's illness. DW2 in his testimony added that by acute psychotic disorder he meant that the appellant was not

in contact with reality. There were disturbances in his way of thinking, perception and behaviour. The 'disorder', he said, was almost similar to that of schizophrenia although in acute psychotic disorder the full criteria of schizophrenia are not met. DW2 also said it appeared that the appellant was suffering from that illness since December 1992.

[11] From his interviews with the appellant, DW2 found him to be rational and coherent in his speech and showed the appropriate emotional responses when the appellant described the incident of the crime. When DW2 first met the appellant on 2 April 1993 he found the appellant to be in contact with reality, not on any medication and there was no evidence that the appellant was then showing any psychotic symptoms, although he looked depressed.

[12] The law on unsoundness of mind as a complete defence in our criminal jurisprudence is, as was correctly submitted by learned counsel for the appellant, contained in s 84 of the Penal Code. It states:

> 84 Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

[13] This section exempts a person found to be insane of any criminal responsibility if is found that he is 'incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law' (see commentary in *Ratanlal and Dirajlal's Law of Crimes* (25th Ed) p 280). The learned authors there further commented that a person 'is not protected if he knew that what he was doing was wrong, even he did not know that it was contrary to law, and also, if he knew what he was doing was contrary to law even though he did not know that it was wrong.'

[14] Thus, under s 84 Penal Code, criminality has to be determined according to that legal test and not merely by the mental state of an accused person according to the medical test.

[15] There is a distinction between the notion of a legal insanity and medical insanity. Not every form of insanity exempts a person from criminal responsibility. Only legal insanity provides that exemption under s 84 Penal Code. The specie of insanity addressed by s 84 is the one that impairs the cognitive faculties of a person. Its nature and extent must be that to make the offender incapable of knowing the nature of his act, or that he is doing is wrong or contrary to law. The criminality of an act therefore must be determined by this test laid down in s 84 as distinguished from the medical test (see *Ratanlal and Dhirajlal's Law of Crimes* (25th Ed) p 280). As was stated recently by this court through the judgment of Ariffin Zakaria JCA (as he then was) in *Public Prosecutor v Muhammad Suhaimi Abdul Aziz* [2004] 1 CLJ 378:

> It is settled law that the defence of insanity under s 84 is concerned with the accused's legal responsibility at the time of the alleged offence and not with whether he was medically insane at that time. See *Pendakwa Raya v Zainal Abidin bin Mat Zaid* [1993] 1 CLJ 147; *PP v Misbah bin Saat* [1997] 3 MLJ 495.

[16] When the defence of insanity is raised the court thus needs to consider two matters, namely:

(i) whether the accused person has successfully established, as a preliminary issue, that at the time of committing the act he was of unsound mind, and

(ii) if he was of unsound mind, whether he has proven that his unsoundness of mind was of a degree to satisfy one of the tests earlier mentioned ie that the accused was incapable of knowing the nature of his act as being wrong or against the law (see *Ratanlal and Dhirajlal's Law of Crimes* (5th Ed) p 289 et seq).

[17] It is also settled law that the burden of proof rests on the person who raises the defence of insanity (see *Juraimi bin Hussin v Public Prosecutor* [1988] 1 MLJ 537 also *Baharom v Public Prosecutor* [1960] MLJ 249). And it is only the accused person who has this right to raise a defence of insanity. It is not open to the court or the prosecution to raise it (see *Public Prosecutor v Misbah bin Saat*).

[18] The standard of proof upon the accused raising the defence of insanity is on a balance of probabilities, as in a civil case (see *Rajagopal v Public Prosecutor* [1977] 1 MLJ 6, *Goh Yoke v Public Prosecutor* [1970] 1 MLJ 63). So, if the appellant here is able to show, either from the prosecution or other evidence that he committed the crime but was at that time insane, he cannot be culpable by virtue of s 84 Penal Code.

[19] We therefore need to scrutinize the evidence put forth by the appellant. This came from the testimony of DW2, an expert witness called by the defence at the trial, which had been alluded to earlier in this judgment. The learned deputy public prosecutor had also correctly summarized DW2's evidence and pointed to this court what DW2 had concluded. The relevant conclusions made by DW2 are as follows:

(i) I am of the opinion that his illness is not the very serious type; in other words, mild to moderate severity (p 407 Appeal Record ('AR')].

(ii) In this case, I believe accused understands the nature and seriousness of his act (p 454 AR).

(iii) In my opinion, he was able to differentiate between right or wrong at the time of the killing (p 454 AR).

(iv) In my opinion, the accused was able to know [that the act of killing was contrary to law] (p 454 AR).

(v) In my opinion, he was aware at that time [whether the act of killing was wrong] (p 454 AR).

(vi) Yes, but not totally impaired [mental faculties of accused] (p 456 AR).

(vii) Yes, accused was having acute psychosis at the time of killing but the psychosis did not totally impair his cognitive functions iememory, judgment, thinking (p 456 AR).

We observed that DW2's evidence was totally not in favour of the appellant.

[20] The learned trial judge in his summing-up to the assessors noted that DW2 was a government psychiatrist of some experience and thus qualifies as an expert

under s 45 of the Evidence Act 1950. His Lordship was also of the view that DW2 is an expert in a specialised field and thus his opinion was entitled to some weight. We agree.

[21] Now, looking at DW2's evidence we come to a finding that the total effect of his opinion was that the appellant was not of unsound mind at the time he committed the offence which is the crucial point of time when insanity must be established. We also conclude based on that expert's testimony that the appellant was indeed capable of knowing the nature of his act as being against the law. In our considered view, the appellant was, in short, not insane.

[22] We have also considered the defence expounded by the appellant in his testimony. In our view the appellant's act in disposing of the skull after severing the deceased's head showed a degree of guilt and an effort to avoid detection. Where insanity is raised as a defence, this court may consider the circumstances which come after the crime. This is a material consideration in deciding whether the appellant had satisfied the test laid down under s 84. The court may take into account such circumstances and any inference of facts to determine if a plea of insanity has succeeded.

[23] We are also perplexed as to why the appellant had not mentioned about Jimmy in either his cautioned statement or to DW2 during the four interviews he conducted on the appellant. No question was also asked on the existence of this person by learned counsel of the appellant although this was the main force of the defence. We are of the view that the appellant had made up the existence of this person to spice up his story that he was driven by an insane delusion to commit this crime.

[24] We may add here that DW2 is the appellant's own witness and therefore the unequivocal opinion expressed by him would be binding on the defence. This proposition is now trite as was declared by this court in *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14 in the following words of Gopal Sri Ram JCA (at p 47):

> Now, among the general rules that govern judicial appreciation of evidence in both civil and criminal causes in the adversarial system of justice, there is one of fundamental importance. It is that a party is bound by the evidence of witnesses whom he calls in proof of his case. See *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371.

[25] Having considered the defence we found that the appellant had failed on a balance of probabilities to prove that he was of an unsound mind at the time he committed this crime, to succeed under s 84 of the Penal Code.

(b) that the learned trial judge had failed to properly sum up to the assessors on the matter of the appellant's unsoundness of mind at the time he committed the murder

[26] Learned counsel for the appellant had submitted that the learned trial judge did not explain the technical evidence of DW2 to the assessors in order to ensure that

the assessors, who were lay persons, understood the evidence and therefore could properly evaluate the issue of insanity as a defence.

[27] We have scrutinised that part of the summing up of the learned trial judge (pp 608–614 AR) and could not find any justification to the appellant's complaint here.

[28] The learned trial judge had in his summing up to the assessor properly defined and explained the law on insanity. His Lordship also explained in clear terms the burden of proof required of the appellant in raising this defence. He had also recounted the evidence of DW2 to the assessors and had directed them to view the evidence as a whole to determine whether the prosecution had generally succeeded in proving its case beyond a reasonable doubt.

[29] We find that the summing up was undertaken with great care by the learned trial judge and had been impeccable and unimpeachable. We cannot see how the assessors could have misunderstood the summing up or the evidence of DW2. We hold that there has not been any misdirection by the learned trial judge in his summing up. As such this ground of appeal also fails.

[30] In law, once the prosecution had proven its case beyond a reasonable doubt, as was done in this case, there is a presumption that the accused person was sane at the time he committed the offence (see *Bhikari* AIR 1966 SC 1). This rebuttable presumption may be refuted either by leading evidence or relying on the prosecution own evidence. Our scrutiny of the evidence led us to conclude that the appellant had failed to do either.

[31] For these reasons, we dismissed this appeal and confirm the conviction and sentence of the trial court.

Appeal dismissed.

Reported by Andrew Christopher Simon